Editor's note: 81 I.D. 262.

UNITED STATES

v.

LELAND J. CUNEO ET AL.

IBLA 73-336 Decided May 10, 1974

Appeal from decision of Administrative Law Judge Graydon E. Holt in Contest Nos. S-5080, and S-5081, declaring the Gary millsite claim and the Donna millsite claim null and void.

Affirmed.

Administrative Authority: Estoppel--Administrative Practice--
Contracts: Generally--Federal Employees and Officers: Authority to Bind Government--Millsites: Generally--Mining Claims: Contests--Mining Claims: Millsites--Withdrawals and Reservations: Generally

Negotiations between the National Park Service and a millsite claimant resulting in a restoration of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the

new boundary of the withdrawal, did not bind the United States under any contract or estoppel theory from ever contesting the amended millsite claims to determine their validity. The Department of the Interior has authority to contest millsite claims even in the absence of a patent application.

Millsites: Generally--Mining Claims: Determination of Validity--Mining Claims: Millsites--Withdrawals and Reservations: Effect of

The filing of a withdrawal application by the National Park Service segregates the land from mining location, and in a contest against millsites within the segregated area requires a claimant to show that millsite claims are valid as of the application date.

Millsites: Generally--Mining Claims: Millsites--Rules of Practice: Appeals: Burden of Proof

After the Government has made a prima facie case of invalidity, a millsite claimant

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has the burden of establishing the validity of his claim by a preponderance of the evidence.

Millsites: Generally--Mining Claims: Determination of Validity--
Mining Claims: Millsites

An objective standard of reasonableness will be applied to determine whether a millsite claim is invalid because of the nonuse of a mill structure which had been used in the past.

Millsites: Generally--Mining Claims: Millsites

Where a mill had not been used for more than a decade prior to a withdrawal application, the mill was then not operable without more than nominal startup costs, the sources of ore for mill feed were questionable, and a proposed mining and milling operation was economically infeasible, the nonuse of the mill was more than a reasonable interruption in a milling operation, and a millsite claim containing the mill structure will be declared invalid under either clause of the millsite law.

Millsites: Generally--Mining Claims: Millsites

A millsite that is not being used, and which contains no improvements or other evidence of good faith occupation, is properly declared invalid; nor can it be validated on an expectation of future use alone.

APPEARANCES: Mark C. Peery, Esq., of San Francisco, California, for appellants; John McMunn, Esq., Office of the Solicitor, United States Department of the Interior, San Francisco, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Leland J. Cuneo and Anna Josephine Garibotti have appealed from a decision of the Administrative Law Judge dated March 8, 1973, declaring the appellants' Donna and Gary millsites null and void. The claims are in section 18, T. 3 S., R. 20 E., M.D.M., in Mariposa County in the Merced River Canyon, near the west entrance to Yosemite National Park. These adjoining claims were located in 1954, amended in 1958, and amended again in 1962.

These proceedings were initiated by the Bureau of Land Management (hereinafter BLM) at the request of the National Park Service

(hereinafter NPS) through complaints filed on March 24, 1972, against each claim. Each of the complaints alleged that "the claim is not presently being used for mining or milling purposes." In April the contestees answered. They did not expressly deny that the claims were not presently being used for such purposes. However, they asserted that the claims are valid, and they recited past usage of the sites, the improvements thereon, and their plans for use of the sites in support of this assertion. 1/ The hearing was held before Administrative Law Judge Holt December 21, 1972.

1/ The complaint in this case was inartfully drafted. However, the contestees' answer did not object to the adequacy of the complaint, but affirmatively asserted the validity of the millsites. As the decision will show, the hearing proceeded and both parties introduced evidence on the issues of present use of the millsites, occupancy of the sites, and the past and prospective use of the sites. Counsel for contestees acknowledged that use and occupancy were at issue at the hearing. (Tr. 154.) He has raised no objection regarding adequacy of the complaint in this appeal. There has been no assertion of surprise, inadequate notice, lack of opportunity to prepare, or any failure of administrative due process due to the inartfully drafted complaint, nor does the record show contestees were prejudiced in any way by insufficient notice. The complaint, therefore, does provide an adequate basis for decision. Harold Ladd Pierce, 75 I.D. 270, 275-76 (1968).

Even if we were to assume arguendo that the complaint was subject to a timely objection for failure to make an adequate charge, the contestees failed to do so. Their presentation of evidence and statement of the issues to include occupancy of the millsite and past use of a mill upon the Gary millsite claim constitute a waiver of any objection to the complaint. See Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

At the hearing, the parties explored three main areas of concern: the history and use of the millsites for tungsten processing, the fluctuation of the tungsten market, and the contestees' efforts to locate ores in order to resume operations within the constraints of that market. In a decision dated March 8, 1973, the Administrative Law Judge declared the Gary and Donna millsite claims null and void. He found that as of the date of a withdrawal application on May 3, 1972, the millsites were not being used and occupied for mining and milling purposes. He concluded that in the fifteen years since the Gary mill was used:

> * * * the mill has deteriorated and will require improvements costing from $7500 to $15,000 to restore it. Before spending this sum of money it would be prudent to block out sufficient ore to determine whether this cost could be recovered and a profit made.

He noted that a mine from which contestees hoped to obtain ore for the mill had been reopened, and the contestees' operator had reported hearsay values sufficient to justify reopening the mill, but the Judge concluded:

> [T]his was accomplished months after the mill sites had been withdrawn from location. As of May 3, 1972, the mill was not being used and whether it would be used again in the near future was highly speculative. At that time the mining claimants had nothing more than a vague intention to use the sites.
>
> This intention to use the sites in the future is not sufficient to comply with the requirements of the mill site law.

In their appeal, contestees assert that the Judge's decision was based on a misconception of the millsite law, namely, that the validity of a millsite depends on its being "used" for mining or milling purposes. They assert that a millsite may be valid if it is "occupied" for mining or milling purposes. They contend these millsites are occupied within the meaning of the law because of the existence of the Gary mill, a substantial improvement on the Gary millsite. This conclusion, they argue, is supported first by the use of the mill from 1955 through 1958, and second by the continuing good faith intention of the contestees to resume operations as soon as the tungsten market and the quality of their ores justify resumption.

Contestees have asserted two alternative arguments which they maintain require the dismissal of the contest against their millsite claims. They argue that exhibits and testimony introduced at the hearing (Exs. C-6 through C-11, Tr. 114) demonstrate the existence of a contract entered into by the contestees and the NPS in 1962. The NPS allegedly promised not to contest the Donna and Gary millsites in exchange for: (1) quitclaim deeds to the Government for four other unpatented millsite claims owned, in whole or in part, by the contestees; and (2) amendments to the existing location of the Gary and Donna millsites o that the Park Service could more conveniently use the surrounding area

in the Yosemite National Park Administrative Site. Contestees argue in the alternative that if this evidence does not constitute a contract it suffices to estop the Government to deny that it made such a promise.

We shall consider these latter arguments first. Public Land Order No. 2136, 25 F.R. 6210 (1960), withdrew the lands immediately around the instant millsites for use by the NPS. In order for the millsite locations to be amended so they would not conflict with the withdrawal, the NPS requested the BLM to restore to location under the mining laws the withdrawn lands which would comprise part of the adjusted claims. The Assistant Secretary, at BLM's request, issued Public Land Order No. 2595, 27 F.R. 831 (1962), so modifying Public Land Order No. 2136 to allow the relocation of the Gary and Donna millsites.

It is in light of this restoration and relocation that the transactions between appellants and the NPS must be viewed. In the letter which most strongly supports claimants' position (Ex. C-7), the Assistant Superintendent of Yosemite National Park wrote Mr. Cuneo regarding the request to the BLM:

> The restoration from withdrawal will be on an indefinite basis, that is, no time limit so that you will have ample opportunity to amend the Donna and Gary mill sites to conform with the enclosed meets [sic] and bounds description and subsequently to patent them.

The claimants contend that this language, and assurances contained in another letter which was "lost" and thus not introduced into evidence (Tr. 114- 15), constituted a promise by the Park Service not to contest the millsite claims. (Tr. 110-11, 114-15.) We construe the Exhibit C-7 language differently. At most, NPS personnel said that the restoration period would be "indefinite," not "permanent" as the claimants argue. The length of this indefinite restoration would be defined by the period of time that would provide "ample opportunity" to file a relocation notice and subsequent patent application. The claimants therefore had the use of the amended sites and certain portions of the old sites excluded from the relocation (Ex. C-8) during this period.

Assuming arguendo that this letter and other oral and written communications between appellants and the Park Service constituted an agreement not to contest the claims, the question is whether the ten years between this agreement and the filing of the contest complaint was "ample opportunity" for the claimants to amend the millsite locations and file for patent. The parties recognized that it was impractical to set a fixed date for termination of the restoration, and they did not contemplate that a patent application would have to be filed with the relocation notice. However, it does not take ten years to prepare a patent application. The claimants had more than ample opportunity to file in the years prior to initiation of the contest. Therefore, even

assuming such an agreement, it appears that it was fulfilled by the NPS within any reasonable construction thereof. However, the transactions do not support the existence of any definite, binding agreement not to contest and never to withdraw the land. Instead, they merely reflect negotiations between the Park Service and the claimants regarding the claimants' possessory interests during 1960 through 1962, and adjustments to areas previously withdrawn for use as part of the Yosemite Park administrative site.

The appellants' argument that, in the absence of a contract, the Park Service is estopped to deny a promise not to contest, fails also. Again assuming estoppel could be applicable, i.e., if the Superintendent of Yosemite Park had the authority to bind the United States by such a promise (but see 43 CFR 1810.3(b), codifying Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); United States v. Stewart, 311 U.S. 60 (1940)), and if the claimants suffered detriment by relying on a promise, the estoppel would apply only to the promise made by the NPS, as construed above. Appellants seek to estop the United States from ever contesting the millsite claims, when the NPS only asserted that it would hold open the 1962 restoration long enough to give the appellants "ample opportunity" to relocate and file for patent. The NPS did so in waiting ten years to contest the claims and file a withdrawal application for the land. The NPS has fulfilled the promise

appellants would estop the United States to deny. Therefore, appellants' reliance on the estoppel doctrine fails. Furthermore, claimants have not proved that the claims they relinquished were, in fact, valid claims at the time. The Government disputes that they were, but no evidence establishes the fact. Claimants have not show any detriment to them caused by their failure to file patent applications in reliance on any promise or conduct of the NPS. The contest against the amended claims is not subject to dismissal because of the alleged agreement or any estoppel theory.

In any event, the transactions between the parties do not evidence a guarantee that a patent application, if filed, would be immune from a determination by the BLM as to whether the requirements of the law had been fulfilled by the claimant. The BLM has such a responsibility. 43 CFR 3864.1. Even where a mining claim was once upheld, this Department was not barred from bringing adverse proceedings against the claim when a patent application was filed. United States v. Webb, 1 IBLA 67 (1970). This Department has the duty to assure that full compliance with the laws has been achieved to protect the public interest in the public lands. Cameron v. United States, 252 U.S. 450 (1920); see also Utah Power & Light Co. v. United States, supra. The filing of a patent application is not a prerequisite, however, for institution of contest proceedings to determine the validity of such a claim. This Department

has authority in the absence of a patent application to contest the validity of a millsite. United States v. Dean, 14 IBLA 107 (1973); United States v. Polk, A-30859 (April 17, 1968).

We turn now to the issue of the validity of the claims under the mining law. In making this determination in this case, time is a significant factor. On May 3, 1972, the NPS filed an application with the BLM's California State Office to withdraw the land from mining location, pursuant to 43 CFR 2351, as part of its development plan for the El Portal Administrative Site of Yosemite National Park. (Tr. 27.) The NPS plans to use the contested sites for a sewage treatment plant and a warehouse. (Tr. 35.)

Under 43 CFR 2351.3, the effect of this withdrawal application was to segregate the public land from mining location, and to require the contestees to show that the millsite claims were valid as of the date of the segregation. United States v. Werry, 14 IBLA 242, 81 I.D. 44 (1974); United States v. Polk, supra. See United States v. Henry, 10 IBLA 195 (1973); United States v. Gunsight Mining Co., 5 IBLA 62 (1972).

The facts concerning use of the improvements on the sites are crucial in determining whether the claims were valid as of the date of the withdrawal application. Mr. Cuneo testified that while the

Federal Government had a price support program for tungsten during the early and mid 1950's, he investigated tungsten mining properties and located a mining claim and the two nearby millsites in order to be able to sell tungsten to the Government at a much higher price than the general market. (Tr. 84-85.) He testified that the Gary mill, a structure situated on the Gary millsite, was built in 1954-55 at a cost of $80,000. (Tr. 102.)

From May 1955, when it was completed, through 1958, after the Federal Government terminated its tungsten price support program, the Gary mill processed 3,200 tons of tungsten scheelite ore and 500 tons of custom gold ore. (Tr. 104, 108.) Since 1958 the mill has not been operated, but occasional repairs have been made, including $5,000 spent repairing windstorm damage in 1965. (Tr. 123.) At the time of the withdrawal application, the Gary mill was not operable. The testimony indicated that between $7,500 and $15,000 would be needed in order to put the mill in operating condition. (Tr. 11, 53.) During the brief time the Gary mill was operated the adjoining Donna claim was used to store tailings from the mill on the Gary claim. (Tr. 108.) A water pumping plant was also constructed and operated on the Donna. Most of the tailings were removed for use by contractors as heavy fill, and the evidence failed to disclose how much, if any, was still on the claim. (Tr. 108.) The last tailings

were deposited on the claim in 1958. Similarly, the pumping plant was not used after 1958, and the evidence indicates that it is no longer on the claim. (Tr. 105.)

Since 1958, there has been no use whatsoever made of the Donna millsite. There is no evidence that any improvements remain on the site. Likewise, there has been no use of the Gary millsite other than as the situs of the Gary mill structure, which has not been used since 1958.

From Mr. Cuneo's testimony it appears that the nonuse of the millsites was due to two factors. One, he did not have a source of tungsten ore to process through the mill. As he stated:

> The problem was, all the experts we hired were all wrong. The vast tonnage they gave us wasn't there, so we had to go out and look for more ore.

(Tr. 138.) Two, the market conditions were not favorable. His production of tungsten from his mining properties ended in 1957 because of the cessation of the Government support program. As stated by Mr. Cuneo:

> Government prices dropped from $60.00 a unit to $55.00. Congress extended our buying contract from '56 to '58, but they only appropriated enough funds to carry us through '56. The succeeding Congress in January refused to put up money, and the market dropped to $15.00 a unit and every mine in the United States was out of business except two.

(Tr. 21.) After 1957 the market for tungsten was depressed, although beginning in 1967 the market price gradually increased to $39 per unit 2/ on the world market. It slumped again in 1972 to $33. (Tr. 134, 151.) Since 1968, the Government has attempted to sell for $43 per unit some of the surplus stockpile it acquired for $60. (Tr. 21.)

Appellants contend that they now have a source of tungsten ore to process in the mill, and that it can be mined and milled profitably. The only support for this conclusion is Mr. Cuneo's testimony. His new sources are two mines, the June B and Tin Bucket, which he has under lease. They have not been in operation since the 1950's. Nevertheless, he believes there is enough ore to start up an operation because engineering reports indicated there were from 1,500 to 2,500 tons of commercial ore in sight in the June B mine. (Tr. 13-15.)

Testimony by Mr. Cuneo that a profitable mining operation could be conducted using the June B mine and the Gary mill was

2/ These prices are based upon the standard short ton unit--20 pounds of WO sub3 (tungsten trioxide) in a concentrate which meets the market standards, usually 65% WO sub3 . (Tr. 19.) There was no information in this record concerning the quality of the concentrate produced from the mill, although it was assumed that it would meet market standards as to percentage of tungsten.

controverted by testimony of the Government's experts. One of the Government's experts testified that he examined the mine and took assays of the tungsten ore, but that none of the ore assayed as high as one percent. Mr. Cuneo testified that assays from the mine showed two percent ore and that there was some three percent ore. No assays were submitted, however. The higher percentage ore is essential for a profitable operation. 3/ The Government mining engineer testified that not only were the mines not sources of ore for the millsite, but they were approximately 50 and 70 miles from the millsites (Tr. 61), over semi-mountainous terrain, and were inaccessible for four to six months each year due to adverse weather conditions. (Tr. 62.) Mr. Cuneo estimated the distances to the June B and the Tin Bucket at 42 and 45 miles, respectively. (Tr. 16.) As the Judge found, the nearest market for the milled material was 120 miles from the millsites reached by a mountain road through Yosemite National Park that is closed by weather conditions about half the year. (Tr. 63.) The next closest market place was 210 miles from the millsites, also over mountain roads. (Tr. 63.)

3/ Mr. Cuneo's testimony set his costs as $30 to $40 per ton of ore, depending on which mine he used and whether he was selectively mining. (Tr. 64, 20.) One percent ore milled at 100% efficiency produces one short ton unit per ton of ore. Thus, in order to break even at a market price of $33 per short ton unit, contestee would have to be able consistently to mine better than 1% ore (Tr. 19, 83), since his mill, although well-designed, achieves only 80% recovery. (Tr. 94.)

The Government witness' testimony that the June B mine was not in working condition was uncontroverted. At the time of the hearing no effort had been made to clean up the mine to prepare it for mining operations, which Mr. Cuneo estimated would cost $15,000. (Tr. 15.) He testified he had planned to begin operations in 1971 but due to health problems he was unable to manage the work. (Tr. 126.) In 1972 he contracted to transfer the contestees' interests in the mine and the millsites to one Earl Williams, who did not mine because of access restrictions imposed by the Forest Service due to a high fire hazard that summer. (Tr. 127.) Although Mr. Cuneo testified that he could have profitably operated the mine and the millsite prior to the withdrawal, the significant fact is that in 1971, when, as he testified, his health prevented him from doing physical work, the market for tungsten had slumped from 1969, its highest peak since the artificially high price created by the Government's purchase program in the 1950's.

The record supports the Judge's finding that at the time of the withdrawal the millsites were not in use, and whether they would be used in the future was mere speculation. The fact no efforts were made to use the millsites during a period when market conditions were as favorable, if not more so, and labor costs undoubtedly less than at the time of the withdrawal, raises an inference that if a prudent man did not conduct a mining operation for tungsten prior to that time because of economic conditions, he would not do so thereafter, when conditions were no more favorable.

The use of the Gary mill for ore other than tungsten was very limited. There is nothing in the record to show that it could have been profitably operated as a custom mill for other minerals during the time in question, or that there was any effort made to use it for other minerals except for the 500 tons of custom gold ore milled in 1958, after the tungsten market dropped.

The Gary mill was used intermittently during a four-year period, but it had not been used for more than ten years when the application for withdrawal of the land was filed. It was not operable at that time without expenditures varying from nearly ten to eighteen percent of the original cost of the mill, or from five to ten percent of an estimated replacement cost. (Tr. 102.) Opinions on whether the mill could be profitably used again in the near future differed between the claimant and the Government's witness. We find the probability of profitable operations to be very doubtful.

Were the millsites properly declared invalid under these circumstances? Section 15 of the Act of May 10, 1872, 17 Stat. 96, 30 U.S.C. § 42 (1970), which authorizes the issuance of millsite patents, states in pertinent part:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented

> therewith * * *. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

At the hearing appellant's attorney posed the issue thusly:

> The initial question, of course, Mr. Hearing Examiner, is whether the claims have been used or occupied for mining and milling purposes under the statute.

(Tr. 154.) In this appeal, he repeats assertions which were also made at the hearing, namely, that where a mill has been built on the claim and used, there must be a finding that the millsite has been abandoned in order to invalidate the claim. The only other ground, he contends, is a lack of good faith. He asserts that Mr. Cuneo has not abandoned the structure, nor the claims, and has exercised good faith.

Abandonment and a lack of subjective good faith, however, are not the only grounds for invalidating a millsite which has once been used for milling purposes.

The millsite provision is a part of the general mining laws and must be considered in accordance with those laws. United States v. Werry, supra; Robert C. LeFaivre, 13 IBLA 289 (1973); Eagle Peak Copper Mining Co., 54 I.D. 251 (1933). Thus, it has been held that when the Government has made a prima facie case of

invalidity, a millsite claimant, like a mining claimant, has the burden of establishing the validity of his claim by a preponderance of the evidence. United States v. Swanson, 14 IBLA 158, 81 I.D. 14 (1971). See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

To determine whether a mining claim has been validated by a discovery of a valuable mineral deposit, the test has been objective--what a prudent man would do--not what the claimant himself would or wants to do. Chrisman v. Miller, 197 U.S. 313, 322 (1905); United States v. Harper, 8 IBLA 357, 367, 369 (1972); United States v. Melluzzo, 76 I.D. 181, 192 (1969), set aside and remanded on other grounds, 77 I.D. 172 (1970). In other words, although a mining claimant might testify that he hopes to develop a profitable mine, if the facts known at that time show that the costs of a mining operation will exceed expected returns for minerals from a mining claim, so that a prudent man could no by investing his money and time expect to develop a profitable mine, the requirements of the law have not been satisfied. Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, supra; Cameron v. United States, supra at 459.

In ascertaining whether a claimant under the millsite law has satisfied the statutory requirements, an objective standard is also required to assure that the purposes of the law are met. Thus, in United States v. Swanson, supra, this Board held that the millsite

claimant may be required to demonstrate use or occupation of all the area claimed before he will be granted a patent for the full acreage located. In that case, although the claimant testified he needed all of the acreage within a number of different millsites, the Board looked at the facts objectively and concluded that less than the five-acre statutory maximum per millsite was allowable.

In this case, if the claimant cannot show by objective criteria that the millsite claim was valid at the time of the withdrawal application, the millsite properly may be declared invalid. United States v. Werry, supra. The concept of time also comes into play in considering the nonuse of the millsites. It has long been recognized under the mining laws that a claimant may not perpetually encumber the public lands without fulfilling the purposes of the mining laws. Even where a mining claimant might once have had a valid claim, if he fails to carry his claim to patent he takes the risk that when he finally applies for a patent and the claim is contested, or if the claim is contested in the absence of a patent application, the claim will no longer be found to meet the requirements of the law and will be held invalid. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Mulkern v. Hammit, 326 F.2d 896, 898 (9th Cir. 1964). This principle is applied to mining claims where the mineral on the claim has been exhausted, or where the market for the mineral

has been lost. Mulkern v. Hammit, supra; United States v. Adams, 318 F.2d 861 (9th Cir. 1963); United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969); United States v. Houston, 66 I.D. 161, 165 (1959); United States v. Logomarcini, 60 I.D. 371, 373 (1949).

Likewise, a millsite that might once have been valid can lose that validity. In United States v. Skidmore, 10 IBLA 322 (1973), this Board held that past use of a claim for mining purposes was not sufficient where the occupancy was not maintained. In United States v. Wedertz, 71 I.D. 368 (1964), it was held that planned future use for mining purposes was not sufficient where, although improvements were on the site, present use was merely for prospecting activities. These cases determined the validity of millsites under the first clause of the millsite statute, which expressly requires use or occupancy for mining or milling purposes. However, the requirement of use or such occupancy as evidences an intended use in good faith for milling purposes is inherent in the second sentence concerning the existence of a quartz mill or reduction works. See Charles Lennig, 5 L.D. 190, 192 (1886).

The fact a custom mill has been used in the past has significance, but that fact alone does not serve to perpetuate the validity of a millsite. Even if the claimant's good faith is

not at issue, he may not be considered the "owner of a quartz mill or reduction works" within the meaning of the statute merely because he used a mill on the site in the past. Clearly, if a custom mill is removed from a claim or is rendered unusable because of fire or other destructive force as of the time of withdrawal, we would not hold that because the owner of the mill used it on the land in the past, he is still entitled to a patent. 4/ Where a mill was so dilapidated that it could not be repaired, it has been held that the structure on the millsite was insufficient occupation of the claim for milling purposes. United States v. Skidmore, supra.

In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstrates invalidity. Within this

4/ Where public land laws require a certain type of improvement on a claim at final proof or other determinative date, the fact an improvement may once have been upon the site is not sufficient. For example, under the Mining Claims Occupancy Act, 30 U.S.C. § 701 et seq. (1970), there must be valuable improvements on the claim. In one case a cabin burned down before the crucial time. A temporary trailer was placed on the land, but that was held insufficient to meet the requirement of the law even though the claimant asserted he intended to rebuild the cabin. Stanley C. Haynes, 73 I.D. 373 (1966). Likewise, even though an improvement may still exist upon a claim, if essential equipment has been removed from the structure, or because of disrepair it is no longer suitable for the purpose for which it was built, the requirements of the law are not met. In United States v. Nelson, 8 IBLA 294 (1972), decision upheld sub nom. Nelson v. Morton, Civil No. A-3-73 (D. Alaska, December 21, 1973), a house was held no longer habitable so as to meet the requirements of the homestead law.

concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; 5/ the marketing conditions; costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the site. Because these and other factors vary from case to case, we cannot establish a definite period of nonuse applicable to all cases which would cause the site of a custom mill to lose its validity. We suggest, however, one example of acceptable nonuse. If a mill at the time of a withdrawal or contest was not in operation because bad weather, or work stoppage caused by other short-term circumstances briefly interrupted the flow of ore to the mill, and further operation was clearly expected because of available sources of ores and commitments for the milling work, with only nominal startup costs necessary to proceed with the milling, the basic character of the structure as a mill would not be changed, and the land would be occupied for milling purposes.

In our case, however, we have more than a brief interruption of a few months, or even a few years. Instead, there is more than a decade of nonuse of the mill structure. While the predicted

5/ See United States v. Larsen, 9 IBLA 247, 274 (1973); United States v. Coston, A-30835 (February 23, 1968); United States v. Crawford, A-30820 (January 29, 1968), holding that a dependent millsite will be held invalid if it is used only in connection with a mining claim that is held invalid for lack of a discovery.

startup costs are considerably less than the original cost or replacement cost of the mill, they are more than nominal. Without substantial expenditures the structure is not an operable mill. All of the evidence concerning sources of ore, costs, distance of the mill from the ore and the market, establish the economic infeasibility of a renewed milling operation on the site. The evidence is not persuasive that the prospective use of the Gary mill would serve to meet the purposes of the mining laws by providing an essential and needed milling operation. Instead, the proposal to renew operations suggests an attempt to establish a mere color of compliance with the laws so as to continue to encumber the public lands with the Gary mill structure. See Hard Cash & Other Mill Site Claims, 34 L.D. 325, 327- 28 (1905).

A millsite is not occupied for milling purposes where a mill structure is not used for milling for more than a reasonable time and becomes inoperable. We find that the nonuse of the Gary mill structure was more than a reasonable interruption of a milling operation, that the structure was not operable at the time of the withdrawal application, and therefore, the millsite was not then valid either under the first or second clause of the millsite law.

Most of this discussion has concerned the Gary millsite because of the existence of the Gary mill structure on that site. As has been indicated, however, there has been no use of the Donna

millsite for mining or milling purposes since 1958, and no improvements or other occupancy of the site for such purposes at the time of the withdrawal. Therefore, that claim must also be declared invalid, as it is not used or occupied for mining or milling purposes. Its validity, too, must be tested as of the date of the withdrawal of the land, as well as at the present time. Proposed use of either of the sites for future milling operations is not sufficient. United States v. Wedertz, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed. 6/

Joan B. Thompson
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

6/ With their Statement of Reasons for Appeal, appellants filed a motion to correct asserted errors in the hearing transcript of contestee Cuneo's testimony to comport with an affidavit of Mr. Cuneo attached to the motion. The contestees did not receive a hearing transcript prior to the Judge's decision. The corrections requested do not change the substance of contestee's testimony; they merely clarify the assertedly erroneous portions of transcript. In these circumstances, contestees' motion is granted and contestant's objection to the motion and affidavit is overruled. We have considered the submitted corrections in reaching our decision.

On June 23, 1973, contestant filed a motion for an order amending the April 25, 1973, Order of this Board granting an extension of time to appellant. The motion would delete the phrase "and no objection appearing of record" from this Board's Order. Contestant's motion is granted, and this Board's Order of April 25, 1973, is hereby amended nunc pro tunc.

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I agree with the result reached in the majority opinion, but comment as to construction of section 15 of the Act of May 10, 1872, 17 Stat. 96, 30 U.S.C. § 42 (1970). Regarding the Gary millsite, my concurrence is reluctant because of appellants' substantial investment; however, the mill has not operated since 1958, and appellants have submitted no assay reports or other independent evidence as to sources of ore for the mill.

Under the last sentence of section 15, 1/ the owner of a mill or reduction works, who does not own a mine in connection therewith, may receive a patent for his site "as provided in this section." Such language incorporates, as to custom mills, those portions of the preceding sentence of the section in which it is provided that the site to be patented must be:

a. Nonmineral land.

b. Not contiguous to the vein or lode.

c. Used or occupied for mining or milling purposes.

d. Not larger than five acres.

As of the date of the filing of the withdrawal application, May 3, 1972, the site herein concerned was not being used for

1/ See majority opinion.

mining or milling purposes. The case turns on whether appellants sustained their burden of proving that there was such occupancy as evidences a good faith intention to use the site for such purposes. See United States v. Skidmore, 10 IBLA 322, 327 (1973); Charles Lennig, 5 L.D. 190, 192 (1886). While the record indicates some confusion as to recognition of the "occupied" issue, 2/ appellants were aware of the issue; they presented evidence thereon and they argued the issue. (Tr. 154). Even though the complaint failed to include a charge that the land was not occupied for mining or milling purposes, it must be deemed that appellants had sufficient notice of the issue. See Armand Co., Inc., v. FTC, 84 F.2d 973, 974-75 (2d Cir. 1936), cert. denied, 299 U.S. 597 (1936), noted in DAVIS, ADMINISTRATIVE LAW TREATISE § 8.04 (1958); United States v. Pierce, 3 IBLA 29 (1971). Cf. Fed. R. Civ. P. 15(b). 3/

2/ It is recognized that: (a) the complaint failed to include a charge that the sites were not "occupied" for mining or milling purposes; (b) counsel for contestant stated that "the validity of the mines [to supply the mill] * * * is not being questioned by the Government at this hearing" (Tr. 71); (c) the Administrative Law Judge's decision states on page 1 that the hearing was held to determine whether the claims were actually being "used" for mining or milling purposes; and (d) that decision on page 4 refers to "use" as the Departmental criterion and states that the issue is whether the millsites were used and occupied.

3/ While the Federal Rules of Civil Procedure have not been adopted to govern mining contests, the Rules may be referred to for a guide as to fairness of procedure in connection with administrative pleadings. See In re De Georgey, 7 Ad.L.2d 831 (Office of Alien Property 1958).

The purpose of the statute is to encourage development of custom mills to serve mining areas--"the vein or lode" referred to in the first sentence of section 15. In order to fulfill this purpose, a site occupied for milling purposes must be in proximity to one or more veins or lodes; such veins or lodes must be of a quality and quantity that ore taken therefrom can be processed at the millsite with a reasonable expectation of profit.

Appellee made a prima facie case that such sources of ore were not available. The burden of proof then shifted to appellants to prove the ore sources by convincing evidence. While it is recognized that the market price of metals fluctuates and that under certain circumstances the site of an existing mill may be deemed "occupied" because it is held to be later used for milling purposes, a contestee must in such circumstances prove by specific information the availability and quality of the minerals which are likely to be processed in the mill. Such evidence and expert opinion in connection therewith can then be evaluated, together with information as to expected fluctuations of the market, in order to determine whether occupancy of a site can reasonably be said to be for milling purposes.

On the basis of appellants' evidence, it is not possible to make a determination that the land was so occupied. Appellants have failed to offer convincing proof as to the quality and quantity of

tungsten ore available from the June B and Tin Bucket Mines, the only sources of ore cited. Because appellants have not sustained their burden of proof and on the basis of the prima facie case made by appellee, I reluctantly find that the site was not occupied for mining or milling purposes as of the critical date.

Joseph W. Goss
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